2005

Forest Meadow Ranch Property Owners Association, LLC v. Pine Meadow Ranch Home Owners Association (also known as Pine Meadow Ranch Home Owners Association and as Pine Meadow Ranch Association : Reply Brief

Utah Court of Appeals

Boyd Kimball Dyer; Attorney for Petitioner/Appellant.
Edwin C. Barnes; Attorney for Respondent/Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

FOREST MEADOW RANCH PROPERTY OWNERS ASSOCIATION, L.L.C.,	**ON WRIT OF CERTIORARI FROM THE UTAH COURT OF APPEALS**
Petitioner/Appellant,	**PETITIONER'S REPLY BRIEF**
vs.	
PINE MEADOW RANCH HOME ASSOCIATION (also known as PINE MEADOW RANCH HOME OWNERS ASSOCIATION and as PINE MEADOW RANCH ASSOCIATION,	Supreme Court No. 20050805 - SC
Respondent/Appellee	

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SUMMARY OF ARGUMENTS

Respondent's Brief in Opposition does not begin with the issue on which certiorari was granted, "whether Deseret Diversified Development had the authority as a beneficial owner to impose binding covenants, conditions, and restrictions." But, Petitioner's Reply Brief will begin with that issue.

The Beneficiary's Authority Issue.

On the beneficiary's authority issue, Petitioner argued in its Opening Brief that although a trust beneficiary has authority over its beneficial interest in the trust, the trustee has exclusive authority over the assets it holds in trust. Therefore, since the land in question was an asset held by the trustee in trust, Deseret Diversified had no authority to impose binding CC&R's.

In its Respondent's Brief, Respondent claims that the Utah legislature changed the established rule by including a person holding a power of appointment in the statutory definition of trust beneficiary[1] and that this Court changed the established rule by a 1949 decision, *Cronquist v. Utah State Agr. College.*[2]

In this Reply Brief, Petitioner shows that neither the statutory definition nor

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[1] Utah Code Ann. sec. 75 - 7 - 103 (1) (b) (2005 Supp.).

[2] 114 Utah 426, 201 P.2d 280 (1949).

this Court's 1949 decision changed the established rule.

The Agency Issue.

In its Opening Brief, Petitioner argued that Security Title did not "ratify" the Rerecorded CC&R's by signing the plat because (1) Deseret Diversified was not Security Title's agent, (2) Deseret did not purport to act for Security Title, (3) the Utah Statute of Frauds requires any agency with respect to real property to be in writing, and (4) the plat and the Rerecorded CC&R's are inconsistent.

In its Brief in Opposition, Respondent does not counter those four points, but argues that Deseret Development's status as "developer" gave it authority to impose binding CC&R's. This argument is based on agency law, not trust law.

In this Reply Brief, Petitioner begins by discussing the "fool's errand" problem posed when the higher court grants certiorari on only one of two grounds relied on by the lower court. Petitioner argues from United States Supreme Court precedent that if this Court decides for Petitioner on the beneficiary's authority issue, it should not affirm the Court of Appeals on the agency grounds, but either review the agency issue itself or remand to the Court of Appeals to reconsider the agency issue in the light of the truth that W. Brent Jensen was not Security Title's president.

Petitioner then replies to the argument Respondent makes in its Brief in

Opposition that Deseret Diversified's status as developer gave it authority to impose CC&R's. Petitioner points out that under the Utah Statute of Frauds, Deseret Diversified's status as developer did not give it agency authority with respect to real property.

The Statutory Presumption Issue.

Respondent argues in its Respondent's Brief that the statutory presumption that statements of fact in a recorded document are true[3] applies to Deseret Diversified's statement in the Rerecorded CC&R's that it owns the property in question. Therefore, without regard to trust law or agency law, Deseret Diversified as the presumed owner had the right to impose the CC&R's unless Petitioner can prove it wasn't the true owner.

Petitioner replies that the statutory presumption does not apply to declarations of ownership. Ownership is not a "fact" within the meaning of the statute, but a conclusion of law to be determined from the chain of title.

The Scandalous and Unjust Conduct Issue.

Respondent accuses Counsel for Petitioner of making a scandalous and unjust personal attack on the Court of Appeals. Petitioner replies that Counsel for Petitioner made no personal attack. Counsel only criticized what the Court of

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[3] Utah Code Ann. sec. 57 - 4a - 4 (1) (j) (2000).

Appeals for what it did. On the level of theology the distinction is expressed as "hate the sin but love the sinner." On the level of the law, the distinction allows a lawyer to challenge what a lower court did in the strongest terms without fear that it will be taken as a personal attack.

ARGUMENTS

1. This Court has always distinguished a trust beneficiary's beneficial interest in a trust from the assets held by the trustee in trust.

In its Opening brief, Petitioner pointed out the distinction between the beneficiary's beneficial interest in a trust and the assets held by the trustee in trust. Petitioner explained that the law regards a trust beneficiary's property rights as an interest in the trust itself, analogous to shares of stock in a corporation, not as property rights in the assets held by the trustee in trust, analogous to a corporation's own assets. Petitioner explained that while a beneficiary has authority to dispose of its beneficial interest in the trust (by analogy, to sell the shares), a beneficiary has no authority to dispose of the assets held by the trustee in trust[4] (by analogy, to sell the corporation's assets).

In its Brief in Opposition, Respondent begins by ignoring the distinction. Respondent quotes the Restatement rule that "the beneficiary of a trust has the

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[4] Petitioner's Opening Brief, pp. 17 - 19.

power to transfer his interest,"[5] and then applies this rule to the assets held by the trustee in trust, as though they were the same thing.[6]

On the irrelevance of the Uniform Probate Code.

Respondent then argues that the Utah legislature "implicitly acknowledged" that beneficiaries have power of disposition over the assets held in trust by including in the statutory definition of "beneficiary" a person who holds a power of appointment.[7] Frankly, Petitioner does not understand Respondent's argument on this point, but Petitioner will reply by explaining why the inclusion of a person holding a power of appointment in the statutory definition of "beneficiary" has nothing to do with the issue of a beneficiary's authority over the assets held in trust.

A power of appointment creates a problem for a trust. Until the power is exercised, the ultimate beneficiary will remain unknown. For example, suppose Grantor deeds Blackacre to T in trust, income to L for life, and then the trust to terminate and T to convey Blackacre to such person as P shall appoint by deed or

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[5] Respondent's Brief, p. 23, quoting RESTATEMENT (SECOND) OF TRUSTS, sec. 132 (1959).

[6] "The general right of the beneficiary to alienate its interest in the trust **res** is reaffirmed by the Utah Uniform Trust Code." Respondent's Brief p. 23.

[7] Respondent's Brief, p. 24.

will, or, if P makes no appointment, to Q. In this example, P holds a classic "general power of appointment."

L is the life beneficiary, but who is the remainder beneficiary? If T threatens to cut down all the trees on Blackacre, who can bring an action to prevent the waste? L wont. Cutting down the trees will generate more income for L. But, until P exercises the power of appointment (or dies without having exercised it), the ultimate remainder beneficiary will remain unknown.

The Utah Uniform Probate Code solves this problem by including P in the statutory definition of "beneficiary."[8] P can bring an action to prevent the waste even though the ultimate remainder beneficiary remains unknown. The statutory definition does not reverse the established rule that a trust beneficiary has no power of disposition over the assets held by the trustee in trust. It solves the problem of the unknown beneficiary.

On the irrelevance of *Cronquist v. Utah State Agr. College.*

Respondent then argues that this Court ruled that a beneficiary has authority to convey assets held by the trustee in trust in 1949 by its decision in *Cronquist v.*

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[8] "'Beneficiary' means a person that: . . . (ii) in a capacity other than that of a trustee, holds a power of appointment over trust property." Utah Code. Ann. sec. 75 - 7 - 103 (1) (b) (2005 Supp.).

Utah State Agr. College.[9] Respondent says of that case: "wherein the Court permitted the beneficiary to convey, by quitclaim deed, his interest in the College Farm."[10]

The facts in *Cronquist* were simple. Olif Cronquist died in 1927 and left the College Farm in trust, income to his three children for twenty years and, at the end of the twenty years, the trust to terminate and the trustee to convey the farm to the three children in equal shares. In 1944, when the trust still had three more years to go, Heber Cronquist, one of Olif's three children, entered into an executory contract to sell his one-third share of the College Farm to Utah State Agricultural College when he received it from the trustee and also executed and delivered to Utah State a quitclaim deed to the farm. The quitclaim deed was delivered to Utah State before the trust terminated. After the trust terminated in 1947, Heber brought an action to have the contract and the quitclaim deed declared invalid on the grounds that the trust had been a spendthrift trust and, therefore, he had no power to alienate his interest in the trust in 1944. Utah State counterclaimed for specific performance of the executory contract. The lower court held for Utah State and Heber appealed.

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[9] 114 Utah 426, 201 P.2d 280 (1949).

[10] Respondent's Brief pp. 18 - 29.

In its decision in *Cronquist,* this Court said that "there is only one substantial question involved, and that is whether the testamentary trust created by the will of Olif Cronquist was what is known as a spendthrift trust."[11] The holding of this Court was that to create a valid spendthrift trust "[t]he intention to establish a spendthrift trust ought clearly to appear in the instrument creating the trust. There should be specific language declaring the trust or language from which such an interest might reasonably be inferred. A mere trusteeship is not enough to make a spendthrift trust."[12] Applying that holding to Olif Cronquist's testamentary trust, this Court held it was not a spendthrift trust.

The holding of *Cronquist* has nothing to do with the issue of what interest, if any, Heber transferred by the quitclaim deed.[13] Still, the fact is that Heber executed and deliver a quitclaim deed before the trust terminated. So, the question is "what interest, in any, did Heber transfer by the quitclaim deed?"

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[11] 201 P.2d at 282.

[12] 201 P. 2d at 285, internal citations and quotations omitted.

[13] An interesting question is whether Heber would have had grounds to invalidate the quitclaim deed if the trust had been a spendthrift trust. His quitclaim deed only conveyed whatever rights he had. So, if he had no rights at all (assuming that would be the consequence if the trust had been a spendthrift trust) he would have conveyed nothing by the quitclaim deed. But that is no reason to invalidate a quitclaim deed.

It certainly was **not** Heber's rights as trust beneficiary in the College Farm. If Utah State had been relying on the quitclaim deed as conveying those rights, it would not have insisted that he perform the executory contract. It wanted a new deed from Heber after he received the land from the trustee. It did not rely on the quitclaim deed to convey the fee.

The most likely answer is that Utah State was concerned that Heber had rights in the land not as a trust beneficiary but as Olif's "heir." If Olif's will were held to be invalid, Heber would take a share of the farm as one of Olif's heirs. Utah State must have wanted to be sure that if Olif's will were invalid it would still get Heber's share of the farm, so it had Heber execute and deliver the quitclaim deed to convey whatever rights Heber might have as Olif's heir. These did not include the rights he had as trust beneficiary. Nor did Heber convey his beneficial interest in the trust. If he had, when the trust terminated, the trustee would have deeded Heber's share of the farm directly to Utah State. Utah State had Heber enter into an executory contract to convey his one third interest in the farm when the trust ended and the land was distributed to him.[14]

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[14] This Court did not address the issue of whether, assuming the trust had been a spendthrift trust, Heber could nevertheless enter into a valid executory contract to sell his share of the College Farm in the future when he received it from the trust. Was his entering into the executory contract "alienating his interest in the trust?" Most trust lawyers today would say it was not.

So, *Cronquist* is not a case where this Court "permitted the beneficiary to convey, by quitclaim deed, his interest in the College Farm," as Respondent claims. It is a case where this Court permitted an heir to convey, by quitclaim deed, his rights as heir. This Court has never strayed from the classic rule that "the trustee has exclusive control over the trust property, subject only to the limitations imposed by law or the trust instrument."[15]

2. If this Court decides for the Petitioner on the beneficiary's authority issue, it should not turn this appeal into a fool's errand by affirming on the agency grounds, but either take up the agency issue itself or remand to the Court of Appeals for reconsideration.

The first point is that this Court did not grant certiorari on the agency issue, so why does Respondent feel free to discuss it?

The problem of a grant of certiorari on one issue when the lower court has decided the case on two grounds is the "fool's errand." If this Court decides for Petitioner on the issue on which certiorari was granted (the beneficiary's authority issue), is it obliged to affirm the Court of Appeals on the alternative grounds on which certiorari was not granted (the agency grounds)? If it is, this Court sent Petitioner on a fool's errand when it granted certiorari.

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[15] In Re Estate of Flake, 2003 UT 17, para. 12, 71 P.3d 589, 594.

The solution for the fool's errand problem is shown by the United States Supreme Court's decision in *Piper Aircraft Co. v. Reyno.*[16] In that case a plane manufactured by Piper Aircraft in America crashed in Scotland. The pilot and the passengers were all Scotts. A Scottish company operated and serviced the plane. The pilot had been trained in Scotland and at the time of the crash the plane was subject to Scottish air control. The Scottish air safety authorities investigated the crash.

The passengers' next of kins brought an action in California. They frankly acknowledged that their purpose in bringing the action in the United States was to take advantage of its more favorable products liability law. The action was removed to federal court and transferred to the Middle District of Pennsylvania. Piper then moved for dismissal on the grounds of *forum non conveniens*, stipulating that it would personally appear and defend an action in Scotland.

The trial court granted Piper's motion, but the Third Circuit reversed on two grounds. It held that dismissal is never appropriate when the law of the alternative forum is less favorable to the plaintiff. It also held that under the *Gilbert* balancing test, Pennsylvania was the more appropriate forum in any case.

The United States Supreme Court granted certiorari on the "law less

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[16] 454 U.S. 235 (1981).

favorable to plaintiff" issue but not on the "*Gilbert* balancing test" grounds. It then reversed the Third Circuit on both issues, holding that the action should be dismissed under the doctrine of *forum non conveniens*.

In the majority opinion, the issue of whether the Court was going beyond the grant of certiorari is discussed in a footnote. Justice Thurgood Marshall wrote that the second grounds was implicitly within the grant of certiorari, but

> "even if the issues we discuss in Part III [*i.e.*,the application of the *Gilbert* balancing test] are not within the bounds of the questions with respect to which certiorari was granted, our consideration of these issues is not inappropriate. An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case."[17]

Justice Marshall wrote for a majority of six justices. Three dissented. The dissenters thought the proper disposition was to remand the case to the Third Circuit for reconsideration of the *Gilbert* balancing test. None of the justices thought the decision of the Third Circuit should be affirmed on the alternative ground, turning the granting certiorari on one of two grounds into a fool's errand.

Applying the rule of *Piper Aircraft* to the facts of this case, this Court should either take up the agency issue itself (perhaps asking for additional briefs) or remand to the Court of Appeals for reconsideration in the light of the truth that

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[17] 454 U.S. at 247 n. 12.

W. Brent Jensen was not the president of Security Title.

3. Status as "developer" does not confer agency authority to impose CC&R's on land.

Respondent argues that Deseret Diversified's status as developer is apparent from the Rerecorded CC&R's and the plat, and that this status gave it authority to impose CC&R's. Petitioner replies that a "developer" can have any one of a number of legal relationships with the land owner. The developer can be an independent contractor who has only agreed to do a job and is not subject to control by the owner. It can be an agent who has agreed to act for the owner's benefit and to be subject to the owner's control.[18] It can be an employee who has also agreed to be subject to the owner's control with respect to the manner in which the job is done.[19] "Developer" itself is not a status to which the law gives any agency authority at all.

When it comes to real property, status does not create agency authority. The employees the local Home Depot all have "employee" status, but that does not give them authority to impose CC&R's on Home Depot's land. When it comes to

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[18] RESTATEMENT (SECOND) OF AGENCY sec. 1 (1958).

[19] RESTATEMENT (SECOND) OF AGENCY sec. 2 (1958).

real property, the Utah Statute of Frauds[20] provides that authority can only be created by a written document signed by the owner.

In this case there is a written document signed by the owner of record, Security Title, the Plat for Forest Meadow Ranch Plat "D." The plat does not say that Deseret Diversified was Security Title's "agent." It does not ratify the Rerecorded CC&R's. It does not even refer to them. It does not even cover the same geographic area. The Court of Appeals wrongly says that W. Brent Jensen signed the plat for both Security Title and for Deseret Diversified. If he had signed for both company's that would have been some evidence that the two corporations may have had a close relationship, but, as a matter of law, a close relationship does not create agency authority.

The phrase "as a matter of law" is critical when the issues in this case are matters of the interpretation of recorded documents. The premise of the Utah recording system is that rights in real property are to be decided from the recorded documents, reading those documents in accordance with rules of law so that every lawyer and every judge will give them the same meaning.

The meaning of the "Owner's Dedication" is the same on every plat. It does not establish who owns the land, but only that, if and to the extent the signors have

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[20] Utah Code Ann. sec. 25 - 5 - 1 (1998).

some interest in the land, they dedicate to the public whatever part of the land shown as public property.

Statements on a plat can also put people on "inquiry notice." Again, this is a matter of law. Every lawyer and judge who reads the plat will be put on inquiry notice as to the same things.

Two statements on the Forest Meadow Ranch Plat "D" put people on inquiry notice. The "subdivider's note" puts people on inquiry notice that Deseret Diversified may own the streets. The note says "all streets shown hereon shall remain the property of the subdivider, 'Deseret Diversified Development.'" [R-0027, Addendum document "3" in Petitioner's Opening Brief]. Then there is the word "trustee" following the name of Security Title. These statements do not prove Deseret Development owned the streets or that it was the beneficiary of the trust. They put people on inquiry notice that Deseret might have some ownership interest and that there might be a trust.

Being put on inquiry notice means that if there is an unrecorded deed by which Security Title transferred the streets to Deseret Diversified, or an unrecorded declaration of trust making Deseret Diversified the trust beneficiary, that unrecorded document will be valid and binding. Inquiry notice does not create property rights. It keeps property rights created by other documents from

being invalidated by failure to record. In this case, of course, those other documents have never been produced.

3. The statutory presumption that statements of fact in recorded documents are true does not apply to claims of ownership because the statute regards ownership as a conclusion of law, not as a "fact."

Respondent argues beginning at the bottom of page "14" and continuing on to the end of page "19" of its Brief that the statutory presumption that "recitals and other statements of fact in a [recorded] document . . . are true,"[21] applies to the statement made by Deseret Diversified in the Rerecorded CC&R's that is the "owner" of the south half of Section 22. This argument is purely statutory and is not grounded in trust law or agency law.

Petitioner replies that ownership is not a "fact" within the meaning of the statutory presumption. The basic principle of the Utah Statute of Frauds and the Utah Recording Act is that ownership is to be determined from the chain of title, not from self-serving declarations. Therefore, "ownership" is not a "fact" within the meaning of the statutory presumption. "Ownership" is a conclusion of law to be reached from an examination of the documents in the chain of title.

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[21] Utah Code Ann. sec. 57 - 4a - 4(1)(j) (2000).

If the statutory presumption applies to a self-serving declaration of ownership, transferring property by recorded deeds is so much vanity. If declarations trump the chain of title, people should record declarations of ownership of whatever property they'd like to own and not bother with deeds.

The "facts" covered by the statutory presumption are facts like those stated in the statute – mergers and name changes of organizations.

4. Counsel for Petitioner did not make a personal attack on the Utah Court of Appeals. He criticized the Court of Appeals for what it did.

The Bible tells of many prophets who criticized the Jewish people for what they did – starting with Moses' criticism of the people with respect to their making a golden calf[22] and ending with John the Baptist's call for the Jewish people to repent.[23] But the prophets' criticism was for what the people did, not for who they were. The prophets loved and respected the Jewish people. It was this love that drove them to speak out. The prophets hated the sin but loved the sinners.

Some people did not appreciate the distinction. John the Baptist was beheaded.[24]

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[22] *EXODUS* 32 (King James).

[23] *MATTHEW* 3: 1 – 11 (King James).

[24] *MATTHEW* 14: 1 – 12 (King James).

Like the prophets of old, counsel for Petitioner loves the law. The law provides the common ground where people of different races, religions, and ethnic backgrounds can work together for the common good. This, counsel for Petitioner believes, is America's defining characteristic. Our respect for the law transcends our differences of race, religion, and ethnic background and turns those differences into a source of strength that nations whose identities are based on a common race, religion, or ethnicity cannot understand. So, like the prophets of old, Counsel for Petitioner criticized the Court of Appeals and Judge Greenwood for what they did. He did not make a personal attack.

So Petitioner will reply to Respondent's arguments by answering the simple question "what the Court of Appeals and Judge Greenwood do?"

Respondent accuses Counsel for Petitioner of making "scandalous and unjust" criticism in broad terms, but two specific matters stand out, (1) the factual question of whether W. Brent Jensen was the president of Security Title, (2) the legal question of whether paragraph "17" of *Capital Assets Financial Services v. Maxwell*[25] holds that a trust beneficiary can encumber real property held by the trustee in trust.

Was W. Brent Jensen the president of Security Title?

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[25] 2000 UT 9, 994 P.2d 201.

In her opinion Judge Greenwood wrote as follows:

> "Respondent urges that the interests that later became Deseret were the same as the beneficiaries of the trust naming Security as trustee, and that those beneficiaries were sufficiently definite. Indeed, the facts appear to support this conclusion that Deseret was the beneficial owner despite the lack of comprehensive documentation. Jensen signed on behalf of both Security and Deseret; listed himself as president of Security and incorporator of Deseret; and utilized the term "trustee" only for Security. Moreover, Deseret signed the 1971 CC&R's as beneficial owner and developer. Such evidence is consistent with a scheme in which Deseret would oversee the development of the property granted in the Bates Deed. As such, we conclude the word "trustee" on the 1971 CC&R's, together with extrinsic evidence, reflect the existence of a trust, with Deseret as beneficiary." [2005UT App 264 at para. 30, emphasis added].

What is wrong with that passage? Please take the time to read it again and then consider the following questions:

(1) Who are "the interests that later became Deseret?" Is that phrase sufficiently precise to identify a specific person? Is there anything in the real estate records that shows who that person was? How does a person "become" a corporation? Petitioner submits that the passage does not identify the trust beneficiary in 1965, the date of the Bates Deed, and that the rule of law is that there can be no trust without an identifiable trust beneficiary.[26]

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[26] Utah Code Ann. sec. 75 - 7 - 402 (1) (c) (Supp. 2004), cited by the Court of Appeals at 2005 UT App 294, para. 30; Sundquist v. Sundquist, 639 P.2d 181, 183 (1981)(citing RESTATEMENT (SECOND) OF TRUSTS sec's. 2 and 17 (1959); GEORGE T. BOGART, TRUSTS sec. 11 (6th ed. 1987).

(2) Where is "the trust naming Security as trustee?" The Utah Statute of Frauds expressly requires a written trust document to create a trust with respect to real property. Where is it? Whether the trust was written or oral, what were the terms of the trust? The rule of law is that there can be no trust unless the terms of trust are known.[27]

(3) The truth is that W. Brent Jensen did not sign anything on behalf of Security Title, but precisely what document is Judge Greenwood writing about when she wrote the underlined sentence? Assuming Judge Greenwood is writing about the Plat for Forest Meadow Ranch Plat "D," please take the time to look at it now. It is Addendum document "3" in Petitioner's Opening Brief, but the copy in the record at R-00027 is larger and Petitioner respectfully suggests that the Court should check the record itself on such an important point.

Please note that "Leo D. Jensen" signed for Security Title as its "vice president." Please note that the notarial acknowledgment identifies "Leo D. Jensen & L.R. Wright" as the vice president and secretary of Security Title Co.

(4) Next, the Court may want to look over Respondent's "Brief of Appellee" filed with the Court of Appeals in this case on October 22, 2004, to confirm that

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[27] Sundquist v. Sundquist, 639 P.2d 181, 184 (1981) (citing RESTATEMENT (SECOND) OF TRUSTS sec. 2 and 4 (1959); GEORGE T. BOGART, TRUSTS sec. 11 (6th ed. 1987).

Respondent never claimed that W. Brent Jensen had signed any document on behalf of Security Title. What this means is that the false claim that W. Brent Jensen signed the plat on behalf of Security Title originated with Judge Greenwood.

Courts of law sit in judgment on other professions. Suppose a doctor operated on "Leo D. Jensen" when the true patient was "W. Brent Jensen." The doctor might become the defendant in a court of law. Doctors are expert in medicine. What are judges expert in? Does what the Judge Greenwood did in this case meet this Court's professional standards?

Finally, please note the critical importance in Judge Greenwood's opinion of her false claim that W. Brent Jensen was the president of Security Title. It is the only evidence that Judge Greenwood cites to support her holding that "the interests that later became Deseret" were the trust beneficiary in 1965. She also cites the Rerecorded CC&R's, but they date from 1971, so they are irrelevant to the situation in 1965.

What did this Court hold in *Capital Assets Financial Management?*

In Petitioner's Opening Brief, it points out that in paragraph "17" of its decision in *Capital Assets Financial Management v. Maxwell* this Court held that no trust is created when property is transferred by quitclaim deed for the purpose

of the transferee using it as collateral for a loan. Counsel for Petitioner then argued that it is logically impossible to get from that holding to a holding that trust beneficiaries have authority to encumber the assets held by a trustee in trust.

Please reread Respondent's explanation of *Capital Assets* in footnote "8" on page "19" of the its Respondent's Brief. Respondent's quotations from the opinion deal with the question of whether a judgment lien attaches to assets held by a judgment debtor who is also a trustee. They have nothing to do with the authority of a trust beneficiary to encumber the assets held by the trustee in trust.

Finally, please reread Justice Stewart's opinion in *Capital Assets*. For your convenience, a xerox copy is attached to this brief as Addendum document "7."

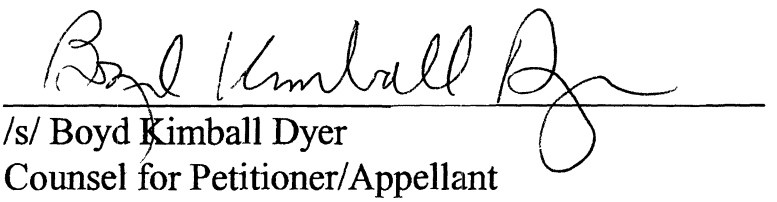
Please make up your own mind whether a reasonable person could draw from the language of paragraph "17" the holding that trust beneficiaries have the power to encumber the assets held by their trustees in trust.

CONCLUSION

For the reasons given above, Petitioner respectfully asks this Court to hold that trust beneficiaries do not have authority to impose binding CC&R's on land held by trustees in trust, and then take up the agency issue, either deciding it and reversing the Court of Appeals, or remanding to the Court of Appeals for reconsideration in light of the truth that W. Brent Jensen did not sign the plat for

Security Title.

Respectfully submitted, this 6th day of March, 2006.



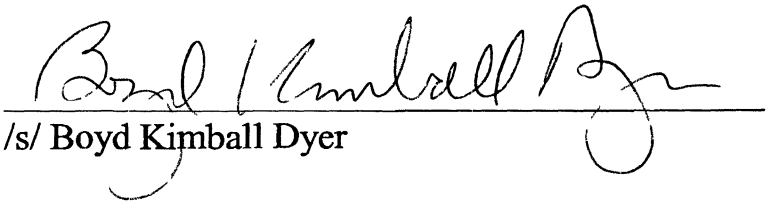
/s/ Boyd Kimball Dyer
Counsel for Petitioner/Appellant

CERTIFICATE OF SERVICE

I certify that on the following date I served two copies of the foregoing Reply Brief by depositing the same in the U.S. Postal Service, first class postage prepaid, addressed to the following person:

Mr. Edwin C. Barnes, Esq.
Attorney for Respondent/Appellee
Clyde Snow Sessions & Swenson
201 South Main Street, Suite 1300
Salt Lake City, UT 84111 – 2216

Dated: March 6, 2006



/s/ Boyd Kimball Dyer

ADDENDUM DOCUMENT "7" – The *Capital Assets* Opinion.

2000 UT 9

CAPITAL ASSETS FINANCIAL SERVICES, Plaintiff and Petitioner,

v.

Garlon J. MAXWELL, Dean R. Lindsay, Val B. Johnson and Janae Peterson a.k.a. Janae Lott, Defendants and Respondents.

No. 980222.

Supreme Court of Utah.

Jan. 14, 2000.

Holder of trust deed brought action to establish priority of its claim over real property, as against judgment lienholder. The District Court, Provo Department, Howard H. Maetani, J., granted trust deed holder's motion for summary judgment, and judgment lienholder appealed. The Court of Appeals, 956 P.2d 1090, reversed and remanded. Certiorari was granted. The Supreme Court, Stewart, J., held that grantor's quitclaim deed of property to grantee so that grantee could pledge the property as collateral for a loan secured by a trust deed created a "real property" interest in grantee upon which a judgment lien attached.

Judgment of Court of Appeals affirmed.

1. Certiorari ⇐64(1)

On certiorari, the Supreme Court reviews the decision of the Court of Appeals for correctness.

2. Judgment ⇐752

A judgment lien has no greater dignity in property law than the nature of the property interest to which it attaches.

3. Mortgages ⇐138

A trust deed is intended to convey some kind of title to real property.

4. Mortgages ⇐138

Of necessity, a trust deed conveys more than "bare legal title" to land because the point of the deed is to allow the sale of the property upon default to satisfy the underlying obligation. U.C.A.1953, 57-1-23.

5. Judgment ⇐780(2)

A judgment lien attaches to a debtor's beneficial and equitable property interests, even if the debtor has no record title. U.C.A.1953, 78-22-1.

6. Judgment ⇐801

Once a judgment lien attaches, a judgment creditor may levy execution on the property or foreclose on the lien if called upon to defend against an action to cancel the lien interest.

7. Judgment ⇐780(5)

A judgment lien will not attach to a debtor's "bare legal title" in property because such a debtor holds no equitable or beneficial interest in the land. U.C.A.1953, 78-22-1.

8. Judgment ⇐780(3)

A judgment lien will not attach to a vendor's interest in a land sale contract. U.C.A.1953, 78-22-1.

9. Judgment ⇐780(5)

No judgment lien will attach to an agent's or trustee's interest in property. U.C.A.1953, 78-22-1.

10. Principal and Agent ⇐127.1, 129

An agent may hold title to property after purchasing it, or before selling it, on behalf of the actual owner.

11. Trusts ⇐134

Trustees hold title in the res of a trust in their names, but do so on behalf of the trust beneficiaries, not themselves.

12. Judgment ⇐780(1)

Grantor's quitclaim deed of property to grantee so that grantee could pledge the property as collateral for a loan secured by a trust deed transferred a beneficial interest in the property to grantee, though grantee deeded the property back to grantor after obtaining the loan, and thus, grantee's interest constituted "real property" upon which a

judgment lien attached. U.C.A.1953, 57–1–1(3), 78–22–1.

See publication Words and Phrases for other judicial constructions and definitions.

13. Judgment ⇐780(1)

Equitable considerations did not make it unfair to hold that judgment lien attached to quitclaim deed grantee's interest in property deeded by grantor so that grantee could pledge the property as collateral for a loan secured by a trust deed, where grantor and trust deed beneficiary, with a modicum of care, could have accomplished their objective of creating a mortgage lien with priority over the judgment lien.

ON CERTIORARI TO THE UTAH COURT OF APPEALS

Bruce A. Maak, Salt Lake City, for plaintiff.

Kent B. Linebaugh, Stephen R. Sloan, Salt Lake City, for defendants.

STEWART, Justice:

¶ 1 This case, which we originally transferred over to the Utah Court of Appeals, is here on certiorari from a decision by that court, *Capital Assets Financial Services v. Lindsay,* 956 P.2d 1090 (Utah Ct.App.1998). The Court of Appeals reversed the district court's grant of summary judgment in favor of Capital Assets Financial Services ("Capital Assets"). We affirm.

¶ 2 The facts of the case are undisputed. In May 1994, Dean R. Lindsay obtained a default judgment against R. Craig Christensen in Utah County. Under Utah Code Ann. § 78–22–1(2), that judgment became "a lien upon [Christensen's] real property ... owned or acquired during the existence of the judgment, located in the county in which the judgment is entered." Utah Code Ann. § 78–22–1(2) (1996).

¶ 3 In late 1994, Christensen sought a loan from Capital Assets. Capital Assets required collateral to secure the loan, and Christensen asked a friend, Larry Peterson, whether he or a family member could make real estate available as security. In January 1995, Peterson's daughter, Janae Peterson Lott, gave Christensen a quitclaim deed for real property she owned in fee in Utah County. There is no dispute that on the date she executed the quitclaim deed, she was the fee title holder. According to uncontested affidavits from Lott, Peterson, and Christensen, Christensen was to use the property to obtain a loan from Capital Assets and then reconvey the property to Lott. Christensen and Lott never intended that Christensen would fully own the property.

¶ 4 Subsequently, Christensen delivered a trust deed for the property dated January 17, 1995, to Capital Assets. Under the trust deed, Capital Assets was the named beneficiary and the trustee had the power to sell the property for the benefit of Capital Assets if Christensen defaulted on the loan. *See* Utah Code Ann. § 57–1–23 (1994). Lott's quitclaim deed to Christensen and Christensen's trust deed in favor of Capital Assets were both recorded January 18, 1995. On April 25, 1995, Christensen reconveyed the property to Lott by warranty deed. Lindsay sought to execute on his judgment lien by sheriff's sale on December 13, 1995.

¶ 5 Capital Assets sued Lindsay, Lott, and two other judgment lienholders to settle the order of lien priority on the property.[1] Capital Assets moved for summary judgment based on affidavits from Lott, Peterson, and Christensen, which stated that, despite Lott's absolute quitclaim deed of the property to Christensen, Lott and Christensen only intended that Christensen use the property as collateral.

¶ 6 The district court granted summary judgment to Capital Assets for two reasons. First, the court ruled that the affidavits were admissible to show the intent of the parties as to the quitclaim deed. Second, based on the affidavits and Christensen's reconveyance of the property to Lott, the court ruled that the sole purpose of the quitclaim deed was to provide Christensen collateral for the purpose of obtaining a loan. After obtaining the loan, Christensen was obligated to return his interest in the property to Lott. In short, the

1. Lindsay and Capital Assets are the only parties before this Court.

court held that Christensen had only a temporary, limited interest in the property and that a judgment lien could not attach thereto.

¶ 7 The Court of Appeals reversed the trial court's summary judgment and held that Christensen's interest was subject to the judgment lien. The court stated:

> In giving Christensen a quitclaim deed to her property, Lott intended to transfer enough ownership to Christensen to allow him to obtain financing by offering the property as security for a loan. Lott intended that Christensen have the authority to transfer to Capital Assets the power to sell the land for an unpaid debt. This degree of ownership is sufficient for a judgment debtor to acquire the power to possess by levy, or sell by foreclosure, the real property to satisfy the unpaid judgment.... Under the circumstances so described, the judgment liens are prior and superior to the interest conveyed by the trust deed.

Capital Assets, 956 P.2d at 1096.

[1] ¶ 8 We issued a writ of certiorari to review that ruling. On certiorari, we review the decision of the Court of Appeals for correctness. *See Bear River Mut. Ins. Co. v. Wall,* 978 P.2d 460, 461 (Utah 1999).

¶ 9 In this Court, Capital Assets argues that the Court of Appeals' decision is wrong because (1) a judgment lien attaches only to a judgment debtor's beneficial interest in property, (2) Christensen did not possess a beneficial interest because he held the property for the limited purpose of securing his loan and therefore had only a bare legal title, and (3) the decision is unfair.

[2] ¶ 10 It is axiomatic that "a judgment lien has no greater dignity in property law than the nature of the property interest to which it attaches." *Butler v. Wilkinson,* 740 P.2d 1244, 1257 (Utah 1987). There is no dispute that Christensen held an interest in the property during the time Lindsay had a judgment lien against whatever real property interests Christensen had in the county. Lott's quitclaim, on its face, conveyed all her rights, title, and interest in the property to Christensen with the intent, according to extrinsic evidence, that he have an interest sufficient to convey a trust deed to Capital Assets. On the face of it, that interest is "real property" under section 78–22–1, the judgment lien statute. Therefore, Christensen had an interest in the property at least "to the degree necessary to convey a trust deed interest to Capital Assets." [2] *See Capital Assets,* 956 P.2d at 1094. That is what Lott intended in quitclaiming to Christensen.

¶ 11 A trust deed is

> a deed ... *conveying real property* to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.
>
> A trust deed is similar to a mortgage in that it is given as security for the performance of an obligation. However, a trust deed is a conveyance by which title to the trust property passes to the trustee. *Upon default, the trustee has power to sell the property to satisfy the trustor's debt to the beneficiary.*

First Sec. Bank v. Banberry Crossing, 780 P.2d 1253, 1256 (Utah 1989) (emphasis added) (internal quotation marks and footnotes omitted); *see also* Utah Code Ann. §§ 57–1–19 to –36 (1994).

[3, 4] ¶ 12 Thus, a trust deed is intended to convey some kind of title to real property.[3] Of necessity, it conveys more than

2. The Court of Appeals agreed with the district court that the affidavits, to the degree they alleged facts, not law, were properly admissible to show that Lott and Christensen intended that Christensen would have ownership in the property only to the extent needed to obtain a loan, i.e., convey a trust deed interest to Capital Assets. *See Capital Assets,* 956 P.2d at 1094. Neither party has asked the Court to review this holding; therefore, the Court of Appeals' decision on that point stands.

3. The trust deed that Christensen conveyed to Capital Assets is consistent with the notion that a trust deed conveys title to property. That deed indicates:

> Borrower [Christensen] irrevocably grants *and conveys* to Trustee, in trust, with power of sale, the following described Property located in UTAH County, Utah....
>
> ....
>
> *BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property*

"bare legal title" to land because the point of the deed is to allow the sale of the property upon default to satisfy the underlying obligation. *See* Utah Code Ann. § 57–1–23 (1994). Christensen's trust deed is conceded to be valid. Indeed, Christensen and Capital Assets admitted Christensen's beneficial interest in the property when they executed the trust deed. The trust deed states:

> Borrower [Christensen] irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described Property....
>
> ....
>
> BORROWER COVENANTS that Borrower *is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property* ....

Capital Assets would not have accepted the trust deed as security if it had not agreed that Christensen held the property interest asserted therein. It follows that the trustor in this case necessarily possessed sufficient fee interest in the property to sell it under certain circumstances. Otherwise, he could not have conveyed that right to the beneficiary.

¶ 13 In short, Lott quitclaimed her interest in the property to Christensen to enable him to create a trust deed. Therefore, as a matter of law and logic, Christensen held a fee interest in the property sufficient to allow him to sell it.

> and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.
>
> ....
>
> ... Reconveyance. Upon payment of all sums secured by this Security Instrument, *Lender shall request Trustee to reconvey the Property* and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. *Trustee shall reconvey the Property* without warranty and without charge to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs.

4. Capital Assets argues that it is possible to possess title sufficient to create an encumbrance on property and still not possess an interest to which a judgment lien can attach. It analogizes this case to *Cannefax v. Clement*, 818 P.2d 546 (Utah 1991), in which the Court held that a judgment lien could not attach to a vendor's interest in a land sale contract. *See id.* at 549. The holding in *Cannefax* hinged on the concept of equitable conversion, which "transform[s] a vendor's interest in a land sale contract from a real property interest into a personal property interest" as the vendee pays the installments on the contract. *See id.* at 548. The Court stated that "the vendor's true interest is in receiving the unpaid amount on the contract, an interest more akin to personalty than to realty." *Id.* at 549. Equitable conversion, however, does not apply in this situation, in which Christensen conveyed a trust deed to Capital Assets. Christensen's interest in the property was not personalty; it was real property, as a trust deed is a "[t]ransfer[ ] in trust of real property." Utah Code Ann. § 57–1–20. Since that interest was realty, not personalty, a judgment lien could attach to it.

I. REQUIRED INTEREST FOR JUDGMENT LIEN TO ATTACH

¶ 14 The judgment lien statute states, "the entry of judgment by a district court is a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered." Utah Code Ann. § 78–22–1(2) (1996). The real estate title of the Code defines "real property" as "any right, title, estate, or interest in land." *Id.* § 57–1–1(3).

[5–11] ¶ 15 For purposes of section 78–22–1, a judgment lien attaches to a debtor's beneficial and equitable property interests, *see, e.g., Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987), even if the debtor has no record title. *See Utah Coop. Ass'n v. White Distrib. & Supply Co.*, 120 Utah 603, 237 P.2d 262 (1951) *rev'd on other grounds*, 2 Utah 2d 391, 275 P.2d 687 (1954). Once a judgment lien attaches, a judgment creditor may levy execution on the property or foreclose on the lien if called upon to defend against an action to cancel the lien interest. *See Free v. Farnworth*, 112 Utah 410, 188 P.2d 731 (1948). However, a judgment lien will not attach to a debtor's "bare legal title" in property because such a debtor holds no equitable or beneficial interest in the land. *See, e.g., Belnap v. Blain*, 575 P.2d 696 (Utah 1978). For example, a judgment lien will not attach to a vendor's interest in a land sale contract.[4]

See Cannefax v Clement, 818 P 2d 546, 549–50 (Utah 1991) (stating that the vendor holds title for the benefit of the vendee and that, based on equitable conversion, vendor's real interest is in personalty, not realty) Nor will a judgment lien attach to an agent's or trustee's interest in property[5] *See Barlow Soc'y v Commercial Sec Bank*, 723 P 2d 398, 401 (Utah 1986)(stating that one holds bare legal title if one is "the trustee of an express, constructive, or resulting trust, or an agent, or mere conduit for the transfer [of property] to the true owner") None of these examples applies in fact or by analogy to Christensen He was not a vendor in a land sale contract, nor was he a trustee or an agent under the facts of this case[6]

¶ 16 Nevertheless, Capital Assets asserts that Christensen's interest amounted to "bare legal title," to which a judgment lien could not attach They rely on dictum found in *Belnap v Blain*, 575 P 2d 696 (Utah 1978), to support their argument In *Belnap*, a plurality quoted the following language from *Freeman on Judgments* but stated that it was inapplicable to the case

> "[W]henever one holds the naked legal title, having no beneficial interest, there is nothing to which the judgment lien can attach, and a sale under execution to a purchaser with notice is inoperative, and does not even convey the legal title Hence when a grantee is a mere conduit, as where he purchases property in his name as the agent of another, with the latter's funds, and subsequently conveys to him, there is no interest to which a judgment lien can attach The same result arises when title is placed in the name of a person so that he may sell it and pay the proceeds to the owner, *or solely to enable him to procure a loan thereon, and after procuring the loan, he reconveys to his grantor* "

Id at 699 (emphasis added) (quoting 2 *Freeman on Judgments* § 956, at 2010–11 (5th ed 1925)) Capital Assets relies heavily on this language, citing the emphasized portion as dispositive in this case

[12] ¶ 17 We have never adopted as Utah law the specific *Belnap* dictum at issue here[7] We decline to do so now There is a significant difference between the type of bare legal title possessed by an agent or trustee and the beneficial interest that Christensen *undisputably* possessed here Agents and trustees have no direct beneficial interest in the property to which they hold title Their title is held purely for the benefit of another In the instant case, Christensen received from Lott more than bare legal title The quitclaim deed was consistent with passing a fee interest and the intent of the parties was to allow Christensen to use the property as security for his own benefit To hold that Christensen's interest was a non-beneficial, "bare legal title" would be inconsistent with chain of title and the intent of the parties

II. EQUITABLE CONSIDERATIONS

[13] ¶ 18 Finally, Capital Assets argues it is manifestly unfair to Lott and Capital

5 An agent may hold title to property after purchasing it or before selling it on behalf of the actual owner *See, e g Zenda Mining & Milling Co v Tiffin*, 11 Cal App 62, 104 P 10 (1909) *Wheeler v Nelson*, 130 Minn 365, 153 N W 861 (1915), *Cresswell v McCaig*, 11 Neb 222 9 N W 52 (1881) Also, trustees hold title in the res of a trust in their names, but do so on behalf of the trust beneficiaries, not themselves *See e g Riverdale Mining Co v Wicks*, 14 Cal App 526, 112 P 896 (1910), *Fitch v Double 'U" Sales Corp* 212 Md 324, 129 A 2d 93 (1957), *Brown v Hodgman*, 124 W Va 136, 19 S E 2d 910 (1942) In each of these instances, the agent or trustee appears to be the owner of the property because title is in the agent's or trustee s name, however, the actual owner is someone else, for whom the agent or trustee holds the property *See, e g , Riverdale Mining* 14 Cal App at 535–36, 112 P 896 If the agent or trustee were to misuse or misappropriate the property the actual owner could sue for damages

6 The Court of Appeals correctly stated Neither Lott nor Christensen intended that Christensen act as trustee or agent for Lott *Capital Assets*, 956 P 2d at 1094 A review of the record confirms that the property was not the res of an express, constructive, or resulting trust in which Christensen was trustee Nor was Christensen Lott's agent, since neither Lott s quitclaim deed to Christensen or those parties' affidavits indicate that he had actual or apparent authority to act on Lott s behalf

7 In *Barlow* we acknowledged that the same proposition advanced by plaintiffs in that case was supported by dictum in *Belnap*, but we did not base our decision in *Barlow* on the dictum

Assets to hold that a judgment lien may attach to Christensen's property interest. It is no doubt true that the result in this case does not comport with the expectations of Lott and Capital Assets. However, with conveyances of real property, we necessarily deal with the recording act and the policies underlying it which are intended to impede fraud, to foster the alienability of real property, and to provide for predictability and integrity in real estate transactions. To that end, the intention of the parties to a transaction may be overridden by rules that promote a basic policy that, in the long run, will effectuate the intentions of most parties in most transactions. As we have stated before, "Under U.C.A., 1953, 78–22–1, a judgment automatically becomes a lien upon all nonexempt real property of the judgment debtor at the time it is docketed. [The] ... right to a judgment lien is unconditional and is not subject to alteration by a court on equitable grounds." *Taylor Nat'l, Inc. v. Jensen Bros. Constr. Co.*, 641 P.2d 150, 155 (Utah 1982). With a modicum of care, the parties could easily have accomplished their objective without any complications. For this Court to extricate them from the difficulties they have created would required us to ignore the plain meaning of the judgment lien statute.

¶ 19 Affirmed.

¶ 20 Chief Justice HOWE, Justice ZIMMERMAN, Justice RUSSON, and Judge HILDER concur in Justice STEWART's opinion.

¶ 21 Having disqualified herself, Associate Chief Justice DURHAM does not participate herein; District Judge ROBERT K. HILDER sat.